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In The Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The National Federation of State High School Associations ("NFHS") is the national service and administrative organization of high school athletics.[1] Founded in 1920, the NFHS is composed of one high school athletic or activities association in each of the fifty states and the District of Columbia. About ninety percent of the high schools in the United States are members of state high school athletic or activities associations that are in turn members of the NFHS.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic activities, including athletics. The NFHS works to enhance the educational experiences of high school students and to reduce the risks arising from their participation in interscholastic athletic programs. The NFHS strives to promote participation and sportsmanship, to develop good citizens through activities that provide equitable opportunities, and to maximize the achievement of educational goals. The objectives of the NFHS include the protection of interscholastic athletics and the development of solutions to problems related to interscholastic athletics at the high school level.

Based on the purposes underlying the NFHS and its objectives, the NFHS has a strong interest in whether

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[1] Pursuant to Supreme Court Rule 37.6, the *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been filed with the Clerk.

recruiting for athletic purposes at the high school level can be properly regulated by state high school activities associations. If this Court does not reverse the judgment in favor of Plaintiff/Appellee Brentwood Academy on its First Amendment claim, the ability of state high school activities associations to regulate athletic recruiting, and to prevent the inequities that it engenders, will be significantly compromised.

SUMMARY OF ARGUMENT

Brentwood Academy's First Amendment challenge to the Anti-Recruiting Rule of the Tennessee Secondary School Athletic Association ("TSSAA") poses a nationwide threat to high school athletics. Every state high school athletic association in the United States forbids athletic recruiting at the high school level. These associations collectively consist of 18,654 schools and represent over seven million student athletes.

State associations prohibit recruiting for good reason. High school athletics are and should remain a source of pride and cohesion for student bodies, parents, and communities. Recruiting for athletic purposes threatens these goals by making competition unfair, in that it allows private schools to entice superior athletes from wide geographic areas, while the public schools against which they compete are largely limited to students within defined geographic boundaries.

The Sixth Circuit's ruling limiting enforcement of the TSSAA Anti-Recruiting Rules has implications for high schools nationwide. The ruling will potentially have a chilling effect on the enforcement of comparable rules in

other states. It threatens the current competitive balance between private and public schools, and promises to increase dissension among them. And by allowing anti-recruiting challenges on a case-by-case basis, it encourages litigation and harms the finances of state high school athletic associations.

Fairness in athletic competition supports quality academics; unfairness works the opposite result. The current state of American intercollegiate athletics, where recruiting is rampant, shows the unfortunate consequences of the Sixth Circuit's ruling promoting high school recruiting. Too many Division I college athletic programs have strayed from their educational missions and brought discredit to their institutions. There is no reason to believe that allowing high school recruiting would produce a happier result. By allowing Brentwood to circumvent the anti-recruiting rules to which it agreed, the Sixth Circuit has set an unfortunate precedent that high schools nationwide will be tempted to follow. An unfair competitive environment – which recruiting encourages – will harm American secondary education.

ARGUMENT

The NFHS believes that the primary mission of United States high schools should be to foster academic education. While the NFHS views cocurricular activities[2]

[2] The phrase "extracurricular activities" is commonly used to refer to activities that supplement the academic aspect of high school education. Many educators, however, prefer the use of the term "cocurricular activities" based on their belief that such activities, when

(Continued on following page)

like athletics as an integral part of the high school experience, those activities should remain consistent with the schools' academic missions. The recruiting encouraged by the Sixth Circuit's decision would change the existing balance between athletics and academics, and would undermine the sense of community that gives a uniquely local character to high school sports.

I. The Uniform Enforcement of the Anti-Recruiting Rules is Important to High School Athletics.

State high school governing bodies are comprised of professional educators, most of whom are school principals. The fact that these educators have uniformly and consistently enacted anti-recruiting rules is telling. As the NFHS 2006-07 Handbook explains in identifying reasons to limit high school recruiting:

> A recruiting/undue influence prohibition discourages exploitation of students; prevents over-emphasis of athletics; gives average student-athletes more opportunity to participate; discourages adults from jeopardizing students' eligibility; and prevents misuse of athletic programs.

NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, 2006-07 HANDBOOK 20 (2006).

Competitive equity is essential to interscholastic athletics. This fact is recognized by many, from children who alternate picking team members to professional sports teams that have draft and salary restrictions.

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kept in their proper context, are inherently educational and support the academic mission of schools.

"[T]he very existence of a game to play, let alone a championship race to savor, requires that the participants cooperate off the field to create a fair and balanced match-up on the field." PAUL C. WEILER, LEVELING THE PLAYING FIELD 2 (2000).

Competitive equity is also essential to further classroom education. In fact, athletics are an extension of the classroom. The TSSAA Constitution recognizes that, "the primary objective of all secondary schools is to educate youth" and that "the athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork." If students realize that competition is unfair, the educational value of the competition is compromised. Indeed, students will eventually stop participating if they believe competition is futile. Jack Roberts, the Executive Director of the Michigan High School Athletic Association, testified below that an anti-recruiting rule is necessary to produce a fair competitive environment because without it, students who lose games consistently will lose the willingness to compete. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 304 F.Supp.2d 981, 993 (M.D. Tenn. 2003), *rev'd in part on other grounds*, 442 F.3d 410 (6th Cir. 2006). The anti-recruiting rules preserve competitive equity and enhance American high school students' athletic experiences. Without anti-recruiting rules, competitive equity would be diminished, and America's secondary educational system would be damaged.

The Court has already recognized that high school athletic programs play an "integral" role in secondary schools. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 289 (2001). Recruiting weakens this integral role because it undermines the fairness of

competition. It also displaces students who have worked their way up to team membership, or even starting positions, at their schools. That displacement can in turn lead to disharmony among students, a fracturing of school spirit, and eventually to a loss of community support for interscholastic activities. Recruitment can also tempt schools to compete rather than educate by drawing coaches away from their teaching responsibilities, and by encouraging them to pursue students solely for non-academic purposes.

The Court should review the Sixth Circuit's opinion to assess the wisdom of its decision to allow high school recruiting to expand.

II. Anti-Recruiting Rules Are Important to NFHS Members.

Anti-recruiting rules are also vital to NFHS members. Though each of the 50 states and the District of Columbia has an athletics or activities association, participation by private schools in these associations is entirely voluntary. Some private schools, including prominent ones like Oak Hill Academy in Virginia and Mount Zion Academy in North Carolina, choose not to join state high school associations because they do not want to be bound by the associations' rules. While these schools have successful athletic programs, they deliberately forego the opportunity to compete in state championships in return for other benefits, particularly the ability to recruit freely. Here, however, Brentwood chose to join the TSSAA in order to compete against other TSSAA schools. In so doing, it contractually agreed to be bound by that organization's rules of competition, including the anti-recruiting rule.

Waiving the right to recruit is a reasonable restriction to which Brentwood and TSSAA were free to agree.

If anti-recruiting rules may no longer be enforced, the fragile competitive balance between high schools, both public and private, will be disturbed, and the dissension between them can only increase. If high school recruiting is expanded, public and private schools would no longer be fairly competing. Public schools would be disadvantaged because they could not recruit beyond their geographical boundaries, and private schools would be disadvantaged because public schools would resist competing against them. This result is not constitutionally necessary and can only be avoided if this Court intervenes.

The Sixth Circuit's decision also threatens the finances of NFHS members. The decision encourages future litigation because the court essentially analyzed whether Brentwood's violation of the anti-recruiting rule was somehow harmless. In doing so, the Sixth Circuit ignored the Court's precedent instructing that the correct inquiry is not whether the rule's purposes are promoted when applied to a particular plaintiff, but whether the rule is justified by substantial state interests. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978). Under the Sixth Circuit's approach, anti-recruiting rules lose their deterrent effect because parties are allowed to challenge whether enforcement in *particular cases* furthers the purposes of the rules. Because state athletics organizations have limited financial means, any threat of litigation will have a chilling effect on their investigation and enforcement of their rules. Review is warranted for this reason as well.

III. Recruiting Has Already Harmed Intercollegiate Athletics, and Promises To Harm High School Athletics As Well.

The college experience foretells the perils awaiting high schools if recruiting is expanded. Instead of supporting academic achievement, big-time college athletics are too often driven by winning and revenue generation. And recruiting is at the core of the problem.

In 1989, the Knight Commission, which is composed of high-ranking educational and athletic leaders, concluded that so many abuses existed in college athletic recruiting that the balance between college academics and college athletics was all but lost. Knight Commission on Intercollegiate Athletics, *Keeping Faith with the Student Athlete: A New Model for Intercollegiate Athletics.*[3] The Knight Commission reconvened in 2001 and determined that despite considerable effort, the problem had worsened. Knight Commission on Intercollegiate Athletics, *A Call To Action: Reconnecting College Sports and Higher Education.*[4]

Others have recognized the adverse effects of recruiting on college students:

> Recruited athletes earn far lower grades than what might be expected on the basis of their incoming academic credentials and demographic characteristics. This striking "underperformance" phenomenon appears to be related directly to the

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[3] http://www.knightcommission.org/about/keeping_faith_download_a_pdf_of_this_publication/ (March 1991).

[4] http://www.knightcommission.org/about/reports/category/A%20Call%20to%20Action/ (June 2001).

> criteria used in recruiting and admitting these athletes – and not to time commitments, differences in race or socioeconomic status, field of study, or the intensity of the athletic experience. Recruited athletes underperform even in seasons or years when they are not participating in athletics.

WILLIAM G. BOWEN & SARAH H. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 328 (2003). The profound impact recruiting has had at the collegiate level has even caught the attention of the United States Congress. In 2004, a House of Representatives subcommittee conducted a hearing entitled "College Recruiting: Are Student Athletes Being Protected?" *See The Committee on Energy & Commerce, College Recruiting: Are Student Athletes Being Protected?*[5]

Recruiting at the college level is not only at odds with the fundamental academic mission of American schools, but it can injure students in other ways:

> This evidence [from Bowen and Levin's book *Reclaiming the Game*] suggests that intercommunity recruiting can pollute the educational value of the interscholastic athletic environment by sending the message to students that the external, competitive value of athletics in the form of glory and profit is more valuable to the student than the student's internal academic and social development. This evidence suggests that intercommunity recruiting can pollute students by sending the message that developing one's athletic assets (which for all but a tiny percentage of

[5] http://energycommerce.house.gov/108/Hearings/03112004hearing1226/hearing.htm (March 11, 2004).

> students are wasting assets) for consumption by others is more valuable to the student than developing one's academic and social assets (which for all students are appreciating assets) for one's own personal growth and benefit.

Kevin P. Braig, *A Game Plan To Conserve the Interscholastic Athletic Environment After Lebron James*, 14 MARQ. SPORTS L.J. 343, 357 (2004).

High school students who are recruited based on athletic prowess may similarly develop a false sense of superiority and an identity based only in athletics. The reality is that less than one percent (1%) of high school athletes will ever reach the professional ranks. Because of over-emphasis on their athletic abilities, many of these athletes, once denied a career in professional sports, may lack the academic tools they need to succeed in society.

Anti-recruiting rules can help lessen the tendency of top athletes to view sports as the only important part of their lives, a view that can lead to the use of performance-enhancing drugs, over-use injuries, missed classes, and premature specialization in a single sport. The rules can also restrain adults who seek their own financial gain or recognition by exploiting student-athletes.

The problems with high school athletic recruiting do not end here – the above examples are merely illustrative. High school educators prohibit recruiting for good reason, and the courts should support rather than hinder their efforts whenever possible.

CONCLUSION

High school athletic competition in our country has a proud tradition, one the NFHS wants to preserve. Recruiting is antithetical to high school educational athletics. It is at odds with the primary academic mission of American high schools. The Sixth Circuit's opinion limiting enforcement of high school anti-recruiting rules is a step backward in American education. The petition for writ of certiorari should be granted.

Respectfully submitted,

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